IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
v.	:	**INDICTMENT NO.**
	:	**CR-2000433**
TRAVIS MCMICHAEL ,	:	
	:	
GREG MCMICHAEL,	:	
	:	
Defendants.	:	

1.13
PETITION FOR CERTIFICATE OF IMMEDIATE REVIEW

Travis and Greg McMichael petition this court to issue a Certificate of Immediate Review pursuant to OCGA § 5-6-34(b)[1] on the basis that the denial of bail in this case, which denial means that the defendants will remain locked up in the county jail pending trial (many months from now), causes a significant deprivation of all the goods that flow from liberty and the presumption of innocence and, where such denial on the facts in this case, many of which are misstated or filled in with speculation and faulty interpretation, and the application of the law to those facts, makes this

[1] "Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, including but not limited to the denial of a defendant's motion to recuse in a criminal case, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted . . . ."

Court's "Order on McMichael Defendants' Petitions for Bond" erroneous, an abuse of discretion, and "of such importance to the case that an immediate review should be had." OCGA § 5-6-34(b).

In addition, we seek a clarification from the Supreme Court of Georgia regarding the standard to be applied to a trial court's denial of bond, variously pronounced over time as an "abuse of discretion," a "flagrant abuse of discretion," and, as the Court here employs, a "manifest and flagrant abuse of discretion," citing four cases, only two of which use the phrase "manifest and flagrant abuse of discretion."[2] Only one other case uses that phrase in reviewing a denial of bail.[3] The other two cases this Court cites use the phrase "flagrant abuse of discretion," and one of those cases, *Prigmore v. State*, 327 Ga. App. 368, 759 S.E.2d 249 (2014), includes a special concurring opinion by Court of Appeals Judge McFadden in which he raises important questions about the intensification of "abuse" by the addition of "flagrant" to it, let alone manifest, which does not appear in that opinion.

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[2] *Constantio v. Warren*, 285 Ga. 851, 684 S.E.2d 601 (2009) and *Ayala v. State*, 262 Ga. 704, 425 S.E.2d 282 (1993).
[3] *Capestany v. State,* 289 Ga. App. 47, 656 S.E.2d 196 (2007).

By adding "flagrant" to "abuse of discretion," it could be the case that a trial court could deny bond by abusing its discretion but the incarcerated defendant may have no grounds to complain because the abuse was not "flagrant." If "flagrant" means in our law what it normally means—"conspicuously or obviously offensive" or shocking because utterly lacking in respect for law, mores, or customs—then the already high bar imposed on defendants has become impossibly higher, as if a defendant is now expected to pole-vault this raised bar without a pole.

It is revealing, moreover, that the Court denied bond by concluding that both McMichaels pose a significant threat or danger to any person, to the community, or to any property in the community (OCGA § 17-6-1(e)(1)(B)) by accepting as fact the many allegations of felonious criminal conduct set out in the Indictment and offered by the State at the bond hearing, suggesting that the Court believes that these underlying allegations reliably predict a repetition of this criminal behavior if released on bond, yet the Court did not find that the defendants pose a significant risk of committing any felony pending trial (OCGA § 17-6-1(e)(1)(C)). This apparent inconsistency raises important questions about the Court's discretion, which deserve review by the Supreme Court of Georgia.

A. Significant Threat or Danger to Any Person, the Community, or Any Property in the Community (OCGA § 17-6-1(e)(1)(B)

"Community" is an abstract concept. It is the word used to denote that collection of people and their property located in a particular place with roughly definable borders common to the members of that community. "Satilla Shores" is the community where the McMichaels lived and where the events took place that brought this case to court. It is the community to which the McMichaels planned and hoped to return if they had been granted bail. It is the community where Leigh McMichael still lives in the house she shared with her husband, son, daughter, and grandson for the past several years. It is where the McMichael family has made a home.

The question presented to the Court, therefore, in this first of four statutory "significant risks" to be assessed at a bond hearing, was whether the McMichaels would pose a significant threat of danger to any person, the community, or any property in that community. The assessment amounts to a prediction by the Court, based upon past behavior by the accused, as to whether, if released and returned to their community, the McMichaels would pose a future significant threat of danger to their

neighbors, visitors to their neighborhood, and the real and personal property situated in that community.

In finding that the McMichaels would pose such a threat of danger to persons, community, or property, and that such risk exists in a proportion sufficient to justify the denial of bond, the Court relied exclusively upon facts presented by the State of some of the underlying allegations in the Indictment, to the complete exclusion of the evidence presented by the defendants, which includes the decades of service each McMichael provided to persons, their community, and property in their community. Moreover, the Court misstates some of the State's allegations of fact presented at the bond hearing and fails to explain in any way how those facts, both the erroneous ones and the ones accurately recounted, carry the power to predict future similar behavior sufficient to deny bail. These mistakes and failures by the Court amount to an abuse of the Court's discretion.

The Court correctly noted that persons living in the McMichaels' community, which of course includes the McMichaels, possessed a "heightened level of suspicion" because of "several break-ins," which involved homes and vehicles there. Travis McMichael himself had been the

victim of one such break-in when his gun had been stolen from his truck [TM Exhibit 32(bb). But then the Court erroneously removes Ahmaud Arbery from being a reasonable suspect in these crimes by asserting that "neither Defendant directly witnessed Ahmaud Arbery (hereinafter 'Arbery') commit a crime in Satilla Shores." Both defendants, the Court continued, "claim they *believe* (emphasis original, suggesting that this "belief" is not grounded in facts) Arbery had been in the neighborhood, but at the time of the incident Arbery had not been reliably identified." Thus, the Court concludes, "when Arbery is seen running through the neighborhood" on February 23, 2020, "the Defendants assumed he had committed a crime," again, intimating that this "assumption" is completely groundless and in no way could be a reasonable one.

In context, however, prior to February 23, 2020, the McMichaels had watched three videos from surveillance cameras inside Larry English's house, under construction, at 220 Satilla Drive. Each one showed the same Black male inside the house. GBI Special Agent Richard Dial, the case agent in this case, testified at a preliminary hearing on June 4, 2020, the full transcript of which was placed into evidence by the State [State Exhibit 4], that Arbery was the man seen on these surveillance videos on October 25,

2019, November 18, 2019, and February 11, 2020, each one in the dark of night. He went further to say that the man seen again on February 23, 2020, was, indeed, Ahmaud Arbery. Dial testified that he was "certain" that it was Arbery on all four occasions, because he could see Arbery's face and his tattoos in each video. Nobody, in fact, has disputed the fact that Ahmaud Arbery had been inside Larry English's house, on video, at least four times, three of them at night. Introduced at the bond hearing as TM Exhibit 32(p) are the videos from Larry English's house, each of which the court should have viewed to see what the McMichaels and Agent Dial saw – that Arbery was in Larry English's house three times prior to February 23rd. To conclude that "Arbery had not been reliably identified" by the McMichaels on February 23, 2020, simply ignores facts and misstates the evidence. It constitutes an abuse of discretion.

Further, Travis McMichael had encountered Arbery personally at that house on the night of February 11, 2020. He had seen him and even called 911 to report his being in that house [TM Exhibit 32(cc)]. A neighbor had received a copy of the video from Larry English, which the McMichaels and the responding police officer viewed that very night. When Greg McMichael saw Arbery running past his house on February 23, 2020, he

had no doubt that it was the same man he had seen on three previous occasions inside that house, most recently just twelve days before. And as Travis McMichael told the Glynn County Police, the man he encountered on Burford Road on February 23rd was the same man he saw at Larry English's house in the videos and in person on the night of February 11th [TM Exhibit 32(aa)].

When the Court concludes that the McMichaels had not "directly witnessed" Arbery commit a crime in Satilla Shores, the Court seems to be applying an evidentiary standard tied to the private persons arrest statute, though this is not made clear in the Court's Order. The Court seems to use this standard as the route to the conclusion that the McMichaels had no legal basis upon which to leave their house that day in pursuit of Arbery. In fact, however, Travis McMichael saw with his own eyes Arbery committing a burglary on English's private property on February 11, 2020, and, when confronted, saw Arbery make a furtive movement toward his pocket, suggesting that Arbery may have been armed. Viewing videos of Arbery inside the house, moreover, constitutes witnessing him trespassing, at a minimum, or committing burglary, at a maximum.

While it is true that the McMichaels never saw Arbery stealing private property from English's house, they knew that English had reported to the police, to them, and to others in the neighborhood that in late October 2019 somebody had stolen expensive equipment and tools from that house, right around the time Arbery had first been seen there just a few days earlier [TM Exhibit 32(n)]. Under O.C.G.A. section 16-7-1, one commits burglary by entering a dwelling with the intent to commit a felony or theft inside, or, even if entering with no such intent but forming it once inside, a burglary has occurred. Whether these sightings would have been sufficient to convict Arbery of burglary in a court of law is beside the point. What matters is that this Court has employed a standard—"directly witnessed"—that then leads the Court to conclude that the McMichaels possessed unfounded beliefs about Arbery's actions on February 23, 2020, and then made an "assumption" about him with no basis in reality. Nothing could be further from the truth. They had articulable reasons to suspect that Arbery had been repeatedly entering their community to commit crimes there. And, most importantly, those articulable reasons had nothing to do with purported racist attitudes or beliefs. In fact, the evidence shows that the McMichaels initially suspected a homeless *white*

man as the person responsible for the crimes in Satilla Shores [TM Exhibit 32(hh)].

The Court then correctly notes that "[n]either Defendant initially called 911." Both defendants, however, explained why the 911 call they did place, prior to the deadly encounter with Arbery, occurred when it did [TM Exhibit 32(aa)]. Greg McMichael did not have his phone on him when he left the house in haste without it. Travis McMichael brought his phone, dropped it on the passenger floorboard of the truck, and was busy driving the truck, only to retrieve it when he stopped driving. At that point, he dialed 911 and then handed the phone to his father, who had moved from the passenger seat to the bed of the truck. Greg McMichael was on the phone with 911 prior to the moment when Arbery chose to rush Travis McMichael to engage him in a deadly battle.

The question the Court ignores throughout its Order, which is the critical question that must be asked and answered by the Court when considering these underlying allegations at a bond hearing, is whether and how the facts of the underlying case, if proved by a preponderance of the evidence, predict future bad behavior reliably enough to conclude that the defendant thereby poses a "significant risk of danger to any person, the

community, or property in the community," as well as the other bond factors to be considered below. Thus, here, while everybody can criticize the failure of the McMichaels to call 911 earlier than they did, we are left with no justifying reasons at all from the Court how this failure can then be used reliably to predict that the McMichaels, in the unlikely event that they were to find themselves again in a situation even remotely similar to this one, would fail to call 911 immediately and would instead, "arm themselves" and "chase" a person through their neighborhood in a pickup truck, attempting to "block" that person's path of travel, all for no good reason, as the Court sees it. Neither man had ever done anything remotely similar to this in their lives, a fact that seems to have been completely left out of the assessment of what they would do in the future. It's as if their long history of law-abiding service counted for nothing.

The Court then recounts several additional alleged facts in support of its conclusion that the McMichaels pose a significant risk of danger to "persons, community and property." Travis McMichael used his pickup truck to attempt to "block Arbery's path of travel" while on a "public street in broad daylight." Since these actions could be legal, as the defense maintains they are under the private persons arrest statute, the Court

should not simply assume that they are illegal. To do so is to eviscerate the presumption of innocence in the defendants' favor. Since the bond hearing is not the place to "try the case," as the Court said more than once, then, again, these facts, if found by a preponderance of the evidence to exist, can only derive their meaning, and, thus, their legality, from the entire context in which they occurred. The paragraphs above set out that context.

After describing the presence of firearms, possessed by the McMichaels—without acknowledging the McMichaels' explanation that they feared Arbery may himself be armed, possibly with a firearm stolen from Travis McMichael or others in the community who had had firearms stolen in recent weeks—the Court then describes the shooting, inaccurately, by noting that Travis McMichael shot Arbery three times after Arbery can be seen on the video "turning toward Travis McMichael." What the Court omits, but is evident from viewing the video or frame by frame version admitted as State Exhibit 16, is that in addition to "turning toward" Travis McMichael, Arbery then rushed at him from a distance no greater than the width of a pickup truck. Only then, at close range, did Travis fire the first shot. And, after that first shot, Arbery began striking Travis in the head with his closed fists and, most importantly, he grabbed the shotgun in

an effort to take it away from Travis. Travis only then shot two more times. One can only guess why the Court thought it an important fact to note that Arbery then "died in the middle of the street." After all, one can defend oneself in a deadly confrontation whether it happens in a house, the workplace, or "in the middle of the street."

But, again misstating facts, the Court follows its misleading description of the shooting with this: "Based on the video admitted into evidence, there appears there was little or no attempt by the Defendants to have a conversation with Arbery." Not only can we hear Greg McMichael yelling to Arbery to stop as he runs toward the back of the pickup truck when it was parked on Holmes Road, where Greg is standing holding a cellphone to his ear while talking to 911, but earlier, as Travis pulled his truck alongside the running Arbery on Burford Road, they are saying to him, as Greg McMichael told Officer Brandeberry, "'Hey, stop, stop. We want to talk to you.' And he just keeps on running. He's looking at us. I mean we're this close to him, you know, and he keeps on running." See also TM Exhibit 32(aa) where Travis McMichael recounts essentially the same thing.

The court concludes its analysis of "significant danger to persons, community, and property" by noting that an errant buckshot from Travis's shotgun lodged in a home adjacent to the shooting. This fact, while beyond dispute, is hardly worthy of mentioning except that the Court apparently thinks it is one more in this long line of allegations about the underlying events that support a finding that it somehow predicts future reckless behavior with a shotgun and the possibility that Travis could break a neighbor's window with errant buckshot again if released on bond. Or something like that. How this constitutes a significant danger of actually recurring, or anything remotely like it, is left unclear and constitutes another abuse of discretion.

Overall, the Court leaves mysterious in its utter silence how any of these facts, both the misstated ones and the accurate ones, can serve as a reliable prediction that, if released on bond, the McMichaels would engage in similar behavior on some future occasion and, thus, constitute a significant danger to persons or property in their community. And the Court reaches this conclusion with no reference to the decades of law-abiding service each man has contributed to his nation and his community. To conclude that these acts on February 23, 2020, over the course of a few

minutes, predict significant future dangerousness is sheer speculation and an abuse of discretion.

B. Significant Risk of Intimidating Witnesses or Otherwise Obstructing the Administration of Justice (OCGA § 17-6-1(e)(1)(D))

The Court notes that the Department of Justice is conducting an investigation for hate crimes violations by the defendants. That separate investigation, for which nothing more was given to the court than a one-paragraph press release from DOJ, never receives any further mention in this part of the Court's Order, leaving it unclear how its existence provides evidence of any probative value regarding a significant risk of intimidating witnesses in that case or this case or obstructing the administration of justice in either case, if there ever is a case brought under federal law (which defense counsel expressed doubts about at the hearing and still believes is unlikely, though, as we all know, getting an indictment from a grand jury is one of the easiest steps to accomplish, if not the easiest, in any criminal case).[4]

[4] Justice William O. Douglas once wrote: "Any experienced prosecutor will admit he can indict anybody at any time for almost anything before any grand jury." Former New York Court of Appeals Judge Sol Wachtler put it more bluntly when he famously said a prosecutor could get a grand jury to "indict a ham sandwich."

The Court moved on to a brief discussion of comments by Greg McMichael "ostensibly attempting to influence the developing investigation." Those comments can be heard in five places on law enforcement officers' body cameras at the scene shortly after the shooting where Greg McMichael lets officers know that he is a former law enforcement officer. It is revealing that the Court characterizes these as "ostensible" attempts to influence the investigation. "Ostensible" means "apparent, purported, but not actual." In order to determine what a comment means, of course, it must be read or heard in context. These are the five comments, in context, with an interpretation more in line with the context and one that reveals how error-prone it can be to take them out of context, as the State and the Court have both done.

(1) When describing to Officer Brandeberry, the first officer to speak to Greg about the incident, what happened, Greg told Brandeberry that he'd been in his driveway working on boat cushions when Arbery, the "guy who we have seen on video on numerous times breaking into these houses, he comes hauling ass down the street. I mean he's got it hooked up."

OFFICER BRANDEBERRY: Was he on foot?

GREG McMICHAEL: On foot. He ain't jogging. He is hooked up. I run in the house and I said, 'Travis the same guy who broke in the house down there' --

OFFICER BRANDEBERRY: Who is Travis?

GREG McMICHAEL: My son. The guy that shot him.

OFFICER BRANDEBERRY: Okay.

GREG McMICHAEL: I said, 'Come on, let's go.' So Travis runs and gets his shotgun. Because the other night the guy stuck his hands in his pants. And so I grab my .357 magnum—*it's an old Glynn County PD issue by the way, when I was a cop*—and so we take off."

Greg continues for several minutes telling the story of what happened, amidst interruptions from other officers who were working the scene.

A more plausible interpretation of Greg's intent behind this otherwise irrelevant detail about his gun and himself is that by alerting investigating officers that he was once a law enforcement officer, the investigating officers now have some assurance and the relief that comes with it that the witness understands the nature of a scene investigation, the need for officer safety and security, the need to preserve the integrity of the scene itself, and that the witness will cooperate fully with police since he, too, was one

of them in the past. That is, in fact, exactly what happened, as we see from the unfolding events at the scene that day. Greg McMichael cooperated fully with every request made of him by law enforcement.

(2) Upon finishing this first of four times recounting the events at the scene that afternoon, Greg asked permission from Officer Brandeberry to wash the blood off his hand from when he turned Arbery over to check him for a weapon.

OFFICER BRANDEBERRY: Yes, give me a second. Let me get some pictures and stuff like that and we'll get everything taken care of.

GREG McMICHAEL: Sure. Sure.

OFFICER BRANDEBERRY: Give me just a minute.

GREG McMICHAEL: Yeah, I was chief investigator with the DA's office for 23 years. So I know what you got to do. I know. Do everything.

OFFICE BRANDEBERRY: Yes. We're just going to take our time.

GREG McMICHAEL: Cover all the bases. Absolutely. We are here to help you.

Just after this exchange, Officer Brandeberry had Greg give him his full name, phone number, and then asked him to go through the events a

second time. Greg, looking across the caution tape to the far side of the scene, noticed officers taking Travis to the medical van.

GREG McMICHAEL: . . . Are they – what are they doing with my son over there? Are they –

OFFICER BRANDEBERRY: I don't know, sir. I have been over here with you.

GREG McMICHAEL: Yeah, I know.

OFFICER BRANDEBERRY: You know as well as I do that they've got their own investigation and stuff to do.

GREG McMICHAEL: Yeah, I know they're going to do that.

Far from attempting to "influence" the investigation, which, for this bond factor means to attempt to obstruct it, to affect its course and outcome in a way favorable to Greg McMichael and in a way that thwarts the administration of justice, Greg McMichael let the investigating officer know that he completely understood that he must be complete, accurate, and thorough, that he has been involved in investigations himself, so he understood what they must do and assured them that he will *not* obstruct them in any way. In fact, just after this exchange, Greg gave two officers assistance by holding out his hands top-side and down-side so that they

could take all the photos they wished before he retrieved some water to wash the blood off his hand. At every point in the investigation at the scene, he complied with all instructions the officers gave him, remaining in place until he was released. And, later, he drove to the police station, upon the request of law enforcement, to give a video-recorded interview, as did Travis.

The Court should note, too, that just after Greg cooperated with Officer Brandeberry in taking photos of Greg's hands, Officer Roberts walked over to them, said hello to Greg, and told Officer Brandeberry "I do know Greg." Officer Roberts was the second officer that afternoon to have recognized Greg and to greet him by name. The first one, Officer Duggan, was the second officer to arrive on the scene, shortly after Office Minshew had arrived. Minshew was no more than a hundred yards or so away, on Satilla Drive, when the confrontation and shooting occurred, having been dispatched on Matt Albenze's 911 call several minutes earlier when Arbery saw Albenze across the street on his phone as Arbery walked out of the English house, and then took off running up the street past Greg McMichael. Officer Duggan, who was tending to Arbery, acknowledged Greg, indicated that he knew who he was, and spoke briefly to him.

(3) The third instance in which Greg alludes to his law enforcement background occurred as he told the full story a second time to Officer Brandeberry. Just as before, when Greg got to the part about seeing Arbery run past him and he went into his house to alert Travis and to get his gun, he mentioned, again, that he went to his bedroom "to get my .357 Magnum – that used to be – Glynn County PD issued by the way – that I toted years ago." When he made this comment, Officer Roberts was standing there with Officer Brandeberry, the same Officer Roberts who had just joined the conversation, had said hello to Greg, and had told Brandeberry that she knew Greg. This second time through the story, he is telling it to Officer Roberts, *who already knows that he is a former law enforcement officer*, while Brandeberry listens and records it on his body camera.

(4) While re-telling the story to Brandeberry and Roberts, Greg recounts the February 11, 2020, incident when Travis had had a personal encounter with Arbery at night at the English house where English had captured him inside the house on video, sent the video to neighbor Diego Perez, and then, after Travis had called 911 and he, his dad, and Diego went to the house to look for Arbery, Glynn County Officer Rash and other

officers responded to the scene. Greg makes the statement to Brandeberry and Roberts:

GREG MCMICHAEL: So anyway -- so Rash gets here and two or three other officers. I don't know them. I used to know every officer down there.

OFFICER JE. BRANDEBERRY: Right.

GREG MCMICHAEL: Since I retired and new guys coming and everything.

Once again, context determines meaning and intent in the words chosen. Greg's mentioning to an officer he knew, and who knew he was retired law enforcement, that he no longer knew the names of the other officers who accompanied Officer Rash, whom he did know, because of changes in personnel since he retired can only be interpreted as a "significant risk of intimidating witnesses or otherwise obstructing the administration of justice" by a tortured and forced context-free reading of it. The video is in evidence. Greg McMichael is not attempting to intimate any witness or otherwise obstruct the administration of justice. To conclude so constitutes an abuse of discretion.

(5) The final time Greg McMichael alludes to his law enforcement background is the weakest of them all for forcing it into the concept of a

"significant risk to intimidate witnesses or otherwise obstruct the administration of justice." In the same body camera video being worn by Officer Brandeberry, introduced into evidence by the State, after Brandeberry has listened to Greg's story twice, the coroner appears with two EMTs, then a third one shows up, at the place where Brandeberry had been interviewing Greg outside Travis's truck. The Court characterizes Greg's interaction with them this way: "For instance, one occasion shows the coroner on the scene performing a routine investigation for her report, and Greg McMichael *inserted himself* (emphasis supplied) into the conversation to provide the facts of the incident. In so doing the Defendant is *ostensibly* (emphasis supplied) attempting to influence the developing investigation."

The coroner asked Officer Brandeberry, "You know what happened?" Brandeberry began to recount the story as Greg had told it to him. Then the coroner asked, "Did he live around here?" Brandeberry answered, "Not that I know of." The five of them, a sixth person joins the circle shortly, are within feet of each other, engaged in the conversation, when Brandeberry expressed his lack of knowledge about where Arbery lived. She then *looked at Greg McMichael*, who asked, "The victim?" The coroner shook her head

yes to Greg. Greg then recounted the portion of the story about how they came to recognize Arbery as the person who had repeatedly entered a house in their neighborhood.

The sixth person appears, the third EMT or fire department person, to hand Greg some wipes to clean the blood off his hand. The coroner turned back to Brandeberry to continue her interview of him for her report. Greg, for his part, began talking *to the EMTs, not to law enforcement*, saying to these three non-law enforcement people:

GREG MCMICHAEL: You know, I knew every EMT, firefighter in Glynn County back years ago when I used to -- I was a Glynn County PD officer. We used to go to wrecks and --

EMT OFFICER: Too many to count now.

GREG MCMICHAEL: I'm telling you. I spent my last 23 years as the chief investigator with the DAs office. I retired in June. Thank you, fellows, I appreciate this [referring to the wipes they provided for him to clean blood off his hands].

This benign conversation occurred while Brandeberry and the coroner were talking *to each other, not to Greg McMichael.* To construe this as an

"ostensible" attempt to influence a developing investigation is simply erroneous and an abuse of discretion.

Still construing Greg McMichael's actions at the scene as significant attempts to obstruct an investigation, the Court next notes Greg's attempt to reach District Attorney Jackie Johnson by phone. In his voice mail to her, he told her that he had been involved in a shooting and that he needed "advice." The court considers this to be "remarkable" that he would call his former boss, the District Attorney. The court, once again, ignores evidence, introduced by the defense, that provides context when failing to mention at all a second recorded voice mail from Greg McMichael to his former boss in which the "advice" becomes clear: Greg thanked Jackie Johnson for referring him to a criminal defense lawyer. Who better to know the reputable criminal defense lawyers in the circuit than the District Attorney of that circuit?

Instead of using this voice mail to interpret the "remarkable" phone call, the Court instead chooses to rely on evidence introduced by the State that at a point during his career as a District Attorney investigator, Greg's boss, Jackie Johnson, assisted him in an issue with the Peace Officer Safety and Training records regarding a deficiency in training hours. In a leap of

logic suitable to its apparent foregone conclusion, the Court takes it that because Ms. Johnson helped Greg with POST records years before, that his phone call to her on February 23, 2020, means that "[a]rguably, he was seeking her influence again." "Arguably," we can suppose, also means, "arguably not."

It defies sound discretion to conclude, as the Court apparently did, that Greg McMichael, by calling his former boss to seek her "advice" in a matter that would surely make the news that very day, during a time when Jackie Johnson was running for re-election as District Attorney, hoped and intended that his call to her would result in some decision by her that would affect an investigation into a matter that Greg McMichael was convinced then, as he is now, was a clear case of self-defense by his son, Travis. It should come as no surprise that a person who believes that neither he nor his son have committed any crime at all would want to convey that information to anybody and everybody with the power to make prosecutorial decisions.

It is surprising that the Court has chosen this nefarious interpretation of Greg McMichael's comments and phone call to impute to him an intent thereby to influence witnesses and the investigation when the State did not,

and could not, call a single witness in law enforcement or a prosecuting attorney's office to *testify* that, indeed, Greg McMichael attempted to change the course of a police investigation in any way. No such evidence exists, until it has been added by the Court in deference to the State's prejudicial interpretation of McMichael's words and actions. This negative gloss that swings free of the actual context constitutes an abuse of discretion.

Next, the Court expresses "concern" and notes that "a number of questions" are raised in the Court's mind because after the shooting on February 23, 2020, and before his arrest on May 7, 2020, Greg McMichael and William Bryan were "apparently communicating" and in a recorded jail phone call Greg McMichael referred to Bryan as an "ally." After interpreting Greg's comments about his having been in law enforcement as bearing nefarious intent, his phone call to Jackie Johnson also sinister, the Court then speculates that maybe Greg had tried to sway Bryan in some way during the six weeks between incident and arrest. No evidence was presented, of course, that Greg did any such thing and the "ally" comment can easily be seen from the context in which Greg said it to mean that "it helps us that Bryan video-recorded the shooting and turned it over to

police; otherwise, the police would have arrived to find two men in the street outside their pickup truck, armed, and a dead unarmed man on the ground, trying to explain, with no corroborating evidence whatsoever, that the unarmed man had attacked the two armed men." To spin the "ally" comment and some unspecified communications between two neighbors about a horrific event in their neighborhood into a "significant risk to intimidate witnesses and otherwise obstruct the administration of justice" is, again, an abuse of discretion. The basis for such a conclusion is not grounded in any evidence presented at the bond hearing.

The Court then finds, out of thin air, another instance where Greg "may have tried to impede the investigation and influence witnesses" when noting that in a phone call with his wife, Leigh McMichael, Greg implored her to ask their daughter to remove from her social media account a photo of Ahmaud Arbery lying in the street. Leigh McMichael testified that both she and her husband were mortified that their daughter, who has emotional issues, would have done such a thing. Lindsay McMichael's social media photo of a scene depicted in scores of police photos is hardly evidence. It strains the meaning of "impeding an investigation" and "influencing a witness" to ask someone to remove a

tasteless photo from a personal social media account that has no evidentiary value whatsoever.

It is should hardly be worth comment here, except that the Court includes it in its Order, that, in another phone call with his wife, Greg said to Leigh to tell some unknown person that "when he answers the phone, tell him flat out not to say anything." That's it. There was no evidence concerning who "he" is, who would be calling him on the phone, what the phone call would be about, and why he should not say anything. The Court just spins the story, again, into something nefarious.

In one last use of a jail phone call by the Court to deny bond, the Court notes that Greg McMichael remarks that "no good deed goes unpunished." The Court, following the State's twisted interpretation of the use of this well-known aphorism, simply assumes that the "good deed" to which Greg McMichael refers is "the shooting and killing of Arbery," as the Court wrote in its Order. Such an interpretation is unfounded and completely ignores context. The "good deed" that Greg so clearly referenced in this phone call is his and Travis's efforts to solve a recurring problem in their neighborhood with burglaries and thefts by attempting to apprehend a suspect for the police to question regarding his repeated entries into a

neighbor's house where, so the McMichaels had been told, thousands of dollars in personal property had been stolen. That "good deed" resulted in charges of murder and incarceration pending trial.

The Court then imputes to Greg McMichael a "desire to hide communications from authorities" because he sent a postcard to a family friend filled with gibberish. Calling it a "code," as the State did and the Court does in its Order, *assumes*, without a shred of evidence, that it means something, which is what the word "code" requires. And only if it means something, and is therefore a "code," could one reach the conclusion that Greg's desire in writing it was to "hide communications from authorities." The pattern here is clear: Take a fact with variable interpretations, affix the most sinister one to it, often ignoring the context of it, and reach a conclusion that denies to Greg McMichael his liberty. This constitutes an abuse of discretion.

Lastly under significant risk of intimidating witnesses—characterized in the Court's Order as "influencing" witnesses—and otherwise obstructing justice, the Court refers to a phone call between Travis McMichael and his mother in which Travis suggested to his mother that she have Lindsay McMichael, Travis's sister, turn off her phone. Given

Lindsay's penchant to post on social media in tasteless and careless ways, the Court's inference that the intent behind this request was "to help evade investigation" defies context and misconstrues meaning.

The Court then takes it as witness-influencing that the McMichaels presented affidavits from neighbors, Matt Albenze, Diego Perez, and John Ronald Olsen, who are witnesses to Arbery's illegal entry into English's house on various occasions, who state under oath that the McMichaels have in no way attempted to influence them in speaking the truth about what they know. The Court seems to think that by merely talking to one's neighbors about a horrific incident that understandably concerns those neighbors, one is thereby attempting to influence those witnesses to say something false or refrain from saying something true. To conclude this from those affidavits constitutes yet another abuse of discretion.

Finally, the Court leaps from the admittedly disingenuous spin Zach Langford gave to a purported racist text message between him and Travis McMichael to, first, Langford's "willing[ness] to say anything to help Travis McMichael" to "discount[ing]" not only Langford's testimony, but the testimony of all of Travis's character witnesses because Travis's "close system of friends and family . . . would help him avoid possible

accountability." This unfounded move from Langford's disingenuous spin on an embarrassing text message to all of Travis's friends and family will help him avoid possible accountability is yet another abuse of discretion, unsupported by facts and logic. . The court's view that the testimony of multiple witnesses who testified similarly that Travis McMichael is not a risk to flee, intimidate witnesses or pose a danger to the community is "of concern," is in itself concerning. The court has essentially put Travis McMichael or any defendant in a no win situation: not calling witnesses means the defendant poses the risks stated above, but calling witnesses who "were all close to the defendant and testified similarly to [a defendant's] good character…shows that a [defendant] has a close system of friends and family that would help him avoid possible accountability." Such a view by the court makes it impossible for any defendant to present evidence in support of the *Ayala* factors and is an abuse of discretion.

C. Significant Risk of Fleeing from the Jurisdiction of the Court or Failing to Appear in Court When Required (OCGA § 17-6-1(e)(1)(A)).

Finally, the Court concluded that the McMichaels "pose a significant risk of flight." We address each reason given for this conclusion in turn.

If convicted, each defendant faces a possible sentence of "life without the possibility of parole plus additional consecutive time." Leaving aside how the "additional consecutive time" could possibly increase a risk of flight if sentenced to die in prison anyway, the Court fails to assess in any way at all how this potential sentence by itself creates a risk of flight. The Court nowhere takes into account that Greg McMichael has spent his entire 64 years of life in Glynn County, aside from a few years in the United States Navy when he was a young man. The defense introduced evidence of roots in the community that extend as far back as Greg McMichael's birth, and include his entire childhood, his adult life, his profession, his wife's entire life, the lives of their children, and, now, his only grandchild, Travis's son. In order to assess seriousness of the offense, the Court must account for the defendant's past, as well as his current belief in his defense. Not one witness who testified that they would place their entire investment in real property on the line to post bail for the McMichaels expressed the slightest hesitation that either of them would flee and cost them their precious belongings. No evidence rebutted the unequivocal assertion by witnesses who've known the McMichaels for decades that they would show up to defend themselves in court when called upon to do so. Again,

to conclude otherwise would mean that no person, in this Court's assessment, could ever receive a bond so long as they face a serious sentenced if convicted.

The next sentence in the Court's expression of belief that the defendants would flee if released makes little sense if it is offered as support for the conclusion that they would flee because they face life without parole. The Court writes: "Adding to the possible sentence, the Defendants' social media accounts and activity, potential evidence of racism, State's Exhibit Number 6, and the announcement of the concurrent Department of Justice investigation all support the Court's concern of a flight risk." If a possible life-without-parole sentence wasn't enough, the Court seems to say, consider that these men may be racists and, as such, the feds may prosecute them for a hate crime. (State's Exhibit 6 *is* the press release that says that the DOJ is investigating a possible hate crime prosecution.) As mentioned above, a DOJ investigation, even if it leads to a federal indictment, which would be lame and eminently defensible, adds no concerns to anybody, either the defendants or their lawyers. To add this on top of life without parole adds nothing.

Finally, the Court seems to think that the McMichaels are a flight risk because they now have no jobs and neither of them owns real property in Glynn County. Greg McMichael was retired. He has no plans to seek employment anyway. Travis McMichael is 34 years old, intelligent, healthy, and a proven reliable employee who, until his arrest, worked a responsible job at a nuclear submarine base with a top security clearance. He is not unacquainted with hard work and would have little difficulty becoming gainfully employed. However, in an effort to alleviate the court's concerns about flight, Travis McMichael posed house arrest and ankle monitor as options that are far better than employment at ensuring appearances in court.

The house the McMichaels share is a rental, true, but it is where the McMichaels have made their home after losing a house in the Great Recession. Their landlord testified that she's allowing Leigh McMichael to live there rent-free and that Greg and Travis could move back in there if released on bond. On the Court's account, property-less accused people who face serious charges can forget about bond in this Court. Owning real property, it appears, is essential if this Court is to grant a bond to someone facing serious charges.

Conclusion

For all these reasons, the McMichaels petition this Court to sign a Certificate of Immediate Review, which must be issued within ten days of the filing of the Court's Order, so that they may apply to the Georgia Supreme Court for review of this important matter.

December 11, 2020.

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Certificate of Service

I hereby certify by my signature that I have served a copy of 1.13: Petition for Certificate of Immediate Review on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it to District Attorney Joyette Holmes, by emailing it to:

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